NO. 48689-0-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

BRANNON I. JONES,

Appellant.

BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Federal Cases

State Cases

Constitutional Provisions

Statutes and Court Rules

ASSIGNMENT OF ERROR

Assignment of Error

1. Substantial evidence does not support the defendant's conviction for trafficking in stolen property.

2. The defendant was denied effective assistance when trial counsel (1) failed to object to the state's closing arguing guilt from post-arrest silence, and (2) failed to object when the state argued substantively from impeachment evidence.

3. The trial court erred when it imposed legal financial obligations upon an indigent defendant without making an individualized inquiry into the defendant's ability to pay.

4. This court should not impose appellate costs on appeal.

Issues Pertaining to Assignment of Error

1. Does a trial court deny a defendant due process of law under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, if it accept's a jury verdict and then sentences a defendant on a charge that is not supported by substantial evidence?

2. Is a defendant denied effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment, if trial counsel (1) fails to object to the state's closing arguing guilt from post-arrest silence, and (2) fails to object when the state argued substantively from impeachment evidence?

3. Does a trial court err if it imposes discretionary legal financial obligations upon an indigent defendant without first making an individualized inquiry into the defendant's ability to pay?

4. Should an appellate court impose costs on appeal if an indigent client has no present or future ability to pay those costs?

STATEMENT OF THE CASE

Factual History

On October 21, 2015, Crystal and Michael Weld drove to their new property on Cloquallum Road in Grays Harbor county to continue remodeling the house before moving in. RP 6-7, 17-19. They had been working on the place for a number of weeks and had various construction tools in the house, the garage and the barn. *Id.* Upon their arrival on the 21st, they noticed that someone had entered the property and stolen the majority of their tools. RP 9-12, 19-22. They immediately called a sheriff's deputy to the scene to make a report and give a list of the stolen property. RP 13-24-25.

The next day the deputy who took the report developed information through a reliable informant that a person by the name of Kelly Marks had purchased most of the stolen property. RP 69-70. The deputy contacted Mr. Marks, who did have the tools. RP 70-74. Mr. Marks told the Deputy that he had purchased the tools from a person by the name of Travis Delbrouck for $500.00 and that he was unaware that they were stolen. RP 70-74. This same deputy then found Travis Delbrouck and arrested him for trafficking in stolen property. RP 78-80. At the time of his arrest Mr. Delbrouck told the deputy that he had stored the stolen tools at his house, and that the defendant Brannon Jones had helped him load the tools into Mr. Delbrouck's vehicle. *Id.*

Although both Mr. Delbrouck and Mr. Marks stated that it was Mr. Delbrouck who had arranged the sale, delivered the tools and taken payment from Mr. Marks, Mr. Delbrouck did tell the police that he had given half of the proceeds to the defendant. RP 110-113. When the deputies arrested the defendant, he denied getting any money from the sale of the tools, although he did admit that he had helped Mr. Delbrouck load the tools into Mr. Delbrouck's vehicle and that when he did so he thought it a possibility that they were stolen, although he did not know for sure. RP 56, 85-86. The defendant is Crystal and Michael Weld's nephew. RP 6-7, 15-16.

Procedural History

By amended information filed January 25, 2016, the Grays Harbor County prosecutor charged the defendant Brannon I. Jones with one count of first degree trafficking in stolen property, one count of possession of methamphetamine, and one count of third degree driving while suspended. CP 1-3, 20-21. The second and third charges arose from the arresting deputy's claim that (1) he found a small amount of methamphetamine in a jacket the defendant had been wearing just prior to his arrest and (2) he saw the defendant driving while his license was suspended but reinstateable. RP 80-82, 87-89.

This case later came to a jury trial during which the state called five witnesses: Crystal Weld, Michael Weld, Kelly Marks, Deputy Keith Peterson

and Deputy Carson Steiner. RP 5, 15, 27, 52, 60. These witnesses testified to the facts set out in the preceding factual history. *See* Factual History. The defense then called Travis Delbrouck, who testified that while the defendant did help him load stolen tools into Mr. Delbrouck's vehicle, the defendant did not know the items were stolen and the defendant did not receive any of the proceeds from the sale of those items. RP 106-112. On cross-examination, Mr. Delbrouck admitted that he had told one of the deputies that he had given half the money to the defendant. RP 113. However, while on the witness stand he admitted that his statements about the defendant were not true. *Id.*

Following the close of evidence the court instructed the jury without objection from either party. RP 123-140; CP 71-79. The parties then presented their closing arguments. RP 140-168. During the state's closing the prosecutor made the following statements concerning the defendant's failure to contact the police prior to his arrest:

> And Deputy Steiner asks him – if he asks – he asks the defendant if he knows why he was looking for him and the defendant's response is something about stolen property. So that right there, the defendant knew the property was stolen. He knew he was involved in a sale. ***He didn't go to law enforcement and say, hey, you know, what – these are my uncle's tools. I didn't know they were my uncle's tools. This – this is my family, I want to come clean and report what happened. He didn't do that.*** Instead, the moment that he saw that Deputy Steiner was after him, he took off. And why did he do that, because he was responsible for the stolen tools being stolen and he knew that he had committed a crime.

RP 148-149 (emphasis added).

The defense did not object that this argument constituted an improper request that the jury infer guilt from the defendant's exercise of his right to silence. RP 149-150. Later in argument the prosecutor made the following statement concerning the facts that the jury should infer from Mr. Delbrouck's statement to one of the deputies.

> In that statement he had told Deputy Steiner that he had agreed with Mr. Delbrouck to sell the tools and split the money, and he specifically stated each time Kelly paid me and gave half of the money to the defendant per their agreement. Now, again, this was a reliable statement, had the opportunity to review it and certified it was true and correct.
>
> Also, this was the first and only time that Deputy Steiner interviewed Mr. Delbrouck. It's not like he interviewed - he talked to Mr. Delbrouck and then Mr. Delbrouck had a chance - an opportunity to think of, okay, well, what - what can I make up to make things better for me. And then get another contact from Deputy Steiner a day or two later after he had an opportunity to fabricate his statement and then make up some story about the defendant helping him to get a beater deal. This was the first time that Deputy Steiner interviewed Mr. Delbrouck. And there was nothing - there was no circumstances indicating that he was coerced in any way to make the statement. He made the statement that he did because that was the truth.

RP 151-152.

The defense did not object to this argument under the theory that the state was improperly making a substantive argument from impeachment evidence. RP 152.

Following closing argument the jury retired for deliberation and eventually returned verdicts of guilty on each count. RP 170-175; CP 80-82.

The court later sentenced the defendant within the standard range, after which the defendant filed timely notice of appeal. CP 102-113; 112. The court then signed a new Order of Indigency, finding that the defendant did not have the ability to pay for an appeal. CP 119-120.

ARGUMENT

I. SUBSTANTIAL EVIDENCE DOES NOT SUPPORT THE DEFENDANT'S CONVICTION FOR TRAFFICKING IN STOLEN PROPERTY.

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment, the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). As the United States Supreme Court explained in *Winship*: "[The] use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law." *In re Winship*, 397 U.S. at 364.

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn.App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. Id. In addition, evidence that is equally consistent with innocence as it is with guilt is not sufficient to support a conviction; it is not substantial evidence. *State v. Aten*, 130 Wn.2d 640, 927 P.2d 210 (1996).

"Substantial evidence" in the context of a criminal case means

evidence sufficient to persuade "an unprejudiced thinking mind of the truth of the fact to which the evidence is directed." *State v. Taplin*, 9 Wn.App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn.App. 757, 759, 470 P.2d 227, 228 (1970)). The test for determining the sufficiency of the evidence is whether "after viewing the evidence in the light most favorable to the prosecution any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 334, 99 S.Ct. 2781, 2797, 61 L.Ed.2d 560 (1979).

In the case at bar the state charged the defendant in Count I with First Degree Trafficking in Stolen Property under RCW 9A.82.050. Section (1) of this statute provides:

> (1) A person who knowingly initiates, organizes, plans, finances, directs, manages, or supervises the theft of property for sale to others, or who knowingly traffics in stolen property, is guilty of trafficking in stolen property in the first degree.

RCW 9A.82.050.

Under this statute there are two alternative ways of committing the offense. The first is to "knowingly" be involved in the theft of property for the purpose of selling that stolen property. The second is to "knowingly" traffic in stolen property.

In the case at bar the court only instructed the jury on the second alternative method of committing the offense. *See* Instruction No. 7, CP 74.

Thus, the state had the burden of proving that the defendant knowingly trafficked in stolen property. Although there was conclusive evidence presented in this case that the property Travis Delbrouck sold to Kelly Marks was stolen, there was no evidence presented that the defendant knew it was stolen when he helped Mr. Delbrouck load it into his vehicle. At best the admissible substantive evidence at trial showed that the defendant thought it a possibility that the property was stolen. However, this evidence is short of the requisite *mens rea* of "knowingly" that the property was stolen. Thus, in this case substantial evidence does not support this essential element of the offense. As a result, substantial evidence does not support the defendant's conviction on this count.

II. THE DEFENDANT WAS DENIED EFFECTIVE ASSISTANCE WHEN TRIAL COUNSEL (1) FAILED TO OBJECT TO THE STATE'S CLOSING ARGUING GUILT FROM POST-ARREST SILENCE, AND (2) FAILED TO OBJECT WHEN THE STATE ARGUED SUBSTANTIVELY FROM IMPEACHMENT EVIDENCE.

Under both United States Constitution, Sixth Amendment, and Washington Constitution, Article 1, § 22, the defendant in any criminal prosecution is entitled to effective assistance of counsel. The standard for judging claims of ineffective assistance of counsel under the Sixth Amendment is "whether counsel's conduct so undermined the proper functioning of the adversary process that the trial cannot be relied on as

having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984). In determining whether counsel's assistance has met this standard, the Supreme Court has set a two part test.

First, a convicted defendant must show that trial counsel's performance fell below that required of a reasonably competent defense attorney. Second, the convicted defendant must then go on to show that counsel's conduct caused prejudice. *Strickland*, 466 U.S. at 687, 80 L.Ed.2d at 693, 104 S.Ct. at 2064-65. The test for prejudice is "whether there is a reasonable probability that, but for counsel's errors, the result in the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Church v. Kinchelse*, 767 F.2d 639, 643 (9th Cir. 1985) (citing *Strickland*, 466 U.S. at 694, 80 L.Ed.2d at 698, 104 S.Ct. at 2068). In essence, the standard under the Washington Constitution is identical. *State v. Cobb*, 22 Wn.App. 221, 589 P.2d 297 (1978) (counsel must have failed to act as a reasonably prudent attorney); *State v. Johnson*, 29 Wn.App. 807, 631 P.2d 413 (1981) (counsel's ineffective assistance must have caused prejudice to client).

In the case at bar, defendant claims ineffective assistance based upon trial counsel's failure to object when the state (1) argued in closing that the jury should infer guilt from post-arrest silence, and (2) when the state argued substantively from impeachment evidence. The following sets out these

arguments.

(1) Trial Counsel's Failure to Object When the State Argued in Closing That the Jury Should Infer Guilt from the Defendant's Failure to Speak Following His Arrest Denied the Defendant Effective Assistance of Counsel.

The Fifth Amendment to the United States Constitution states that no person "shall ... be compelled in any criminal case to be a witness against himself." Washington Constitution, Article 1, § 9 contains an equivalent protection. *State v. Earls*, 116 Wn.2d 364, 805 P.2d 211 (1991). The courts liberally construe this right. *Hoffman v. United States*, 341 U.S. 479, 486, 71 S.Ct. 814, 818, 95 L.Ed. 1118 (1951). At trial, this right prohibits the State from forcing the defendant to testify. *State v. Foster*, 91 Wn.2d 466, 589 P.2d 789 (1979). It further precludes the state from eliciting comments from witnesses or making closing arguments inviting the jury to infer guilt from the defendant's silence. *State v. Fricks*, 91 Wn.2d 391, 588 P.2d 1328 (1979). Finally, as part of the Fifth Amendment right to silence, a defendant has the right to consult with an attorney prior to and during questioning. *State v. Earls*, *supra*. Any comment on the invocation to this Fifth Amendment right to counsel also improperly impinges upon the Fifth Amendment right to silence. *Id.*

In the case at bar the state specifically argued that the jury should infer guilt from the defendant's exercise of his right to silence prior to arrest. This

argument went as follows:

> And Deputy Steiner asks him – if he asks – he asks the defendant if he knows why he was looking for him and the defendant's response is something about stolen property. So that right there, the defendant knew the property was stolen. He knew he was involved in a sale. ***He didn't go to law enforcement and say, hey, you know, what – these are my uncle's tools. I didn't know they were my uncle's tools. This – this is my family, I want to come clean and report what happened. He didn't do that.*** Instead, the moment that he saw that Deputy Steiner was after him, he took off. And why did he do that, because he was responsible for the stolen tools being stolen and he knew that he had committed a crime.

RP 148-149 (emphasis added).

This argument constitutes a direct comment on the defendant's exercise of this right to silence. The purpose in presenting this argument was to invite the jury to infer guilt from the defendant's failure to go to the police and confess to the crime the state alleged he had committed. As such this argument violated both United States Constitution, Fifth Amendment, as well as Washington Constitution, Article 1, § 9. No possible tactical reason existed for failing to object to this improper evidence. Thus, this failure denied the defendant effective assistance of counsel.

(2) Trial Counsel's Failure to Object When the State Argued Substantively from Impeachment Evidence Denied the Defendant Effective Assistance of Counsel.

Under ER 607 "the credibility of a witness may be attacked by any party, including the party calling the witness." However, "'a prosecutor may not use impeachment as a guise for submitting to the jury substantive evidence

that is otherwise unavailable.'" *State v. Babich*, 68 Wn.App. 438, 444, 842 P.2d 1053 (quoting *United States v. Silverstein*, 737 F.2d 864, 868 (10th Cir.1984)),*review denied*, 121 Wn.2d 1015, 854 P.2d 42 (1993). In addition, the state may not argue substantively from evidence admitted solely for impeachment purposes. This principle is discussed in detail in *State v. Sua*, 115 Wn.App. 29, 60 P.3d 1234 (2003).

In *State v. Sua*, *supra,* the state charged the defendant with indecent liberties after his girlfriend and her 16-year-old daughter gave written and oral statements to the police claiming that the defendant had kissed the daughter, put his hand down her pants and stated that he wanted to have a baby with her. However, at trial both the girlfriend and her daughter testified that they had lied about the defendant's alleged illegal conduct. The state then obtained the admission of the two written statements solely for the purpose of impeachment. However, prior to closing the case, the prosecutor argued that the statements should also be admitted substantively. The court granted the state's request over defense objections and the state then argued substantively from those statement during closing.

The jury eventually convicted the defendant, who appealed, arguing in part that the trial court had erred when it allowed the state to argue substantively from evidence that was inadmissible hearsay that should only have been admitted for impeachment purposes. After a lengthy discussion

about ER 803(d)(1) the Court of Appeals reversed, holding that the evidence was admissible for impeachment purposes only and that the trial court had erred when it allowed the state to argue substantively from it. The court held:

> We conclude that Exhibits 1 and 2 were hearsay within the meaning of ER 801(c)'s middle clause; that they were not exempted from the operation of that clause by ER 801(d)(1)(i); and that the trial court erred by admitting them as substantive evidence. Given the lack of other substantive evidence, it cannot reasonably be argued, and neither party attempts to argue, that the error was harmless. Accordingly, we vacate the conviction, reverse the judgment, and remand for further proceedings.

State v. Sua, 115 Wn.App. at 49.

In the case at bar, the defense called Travis Delbrouck to testify that he was the person who had trafficked in stolen property, that he alone had received the money for this activity, and that the defendant was unaware that the property Mr. Delbrouck sold was stolen. Following this direct testimony, the state impeached Mr. Delbrouck with the fact that he previously told a deputy that the defendant did know that the property was stolen and that the defendant had received part of the proceeds form the sale of the stolen property. In this case, as in *Sua*, this prior inconsistent statement to the deputy was admissible to impeach Mr. Delbrouck's statements made at trial. However, as also occurred in *Sua*, in the case at bar the prosecutor then improperly argued substantively from this evidence. In this case the prosecutor argued:

> In that statement he had told Deputy Steiner that he had agreed with Mr. Delbrouck to sell the tools and split the money, and he specifically stated each time Kelly paid me and gave half of the money to the defendant per their agreement. Now, again, this was a reliable statement, had the opportunity to review it and certified it was true and correct.
>
> Also, this was the first and only time that Deputy Steiner interviewed Mr. Delbrouck. It's not like he interviewed - he talked to Mr. Delbrouck and then Mr. Delbrouck had a chance - an opportunity to think of, okay, well, what - what can I make up to make things better for me. And then get another contact from Deputy Steiner a day or two later after he had an opportunity to fabricate his statement and then make up some story about the defendant helping him to get a beater deal. This was the first time that Deputy Steiner interviewed Mr. Delbrouck. And there was nothing - there was no circumstances indicating that he was coerced in any way to make the statement. He made the statement that he did because that was the truth.

RP 151-152.

In this portion of closing the state committed the same error as did the state in *Sua.* That error was arguing substantively from evidence only admissible for impeachment purposes. In this case there was no possible tactical reason for defendant's counsel to refrain from objecting to this argument, particularly given the dearth of evidence that the defendant knew the property Mr. Delbrouck sold was stolen. Thus, counsel's failure to object denied the defendant effective assistance of counsel.

III. THE TRIAL COURT ERRED WHEN IT IMPOSED DISCRETIONARY LEGAL FINANCIAL OBLIGATIONS UPON AN INDIGENT DEFENDANT WITHOUT MAKING AN INDIVIDUALIZED INQUIRY INTO THE DEFENDANT'S ABILITY TO PAY.

A trial court's authority to impose legal financial obligations as part of a judgment and sentence in the State of Washington is limited by RCW 10.01.160. Section three of this statute states as follows:

> (3) The court shall not sentence a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

RCW 10.01.160(3).

Although the court need not enter written findings and conclusions in regards to a defendant's current or future ability to pay costs, the court must consider this issue and find either a current or future ability before it has authority to impose costs. *State v. Eisenman*, 62 Wn.App. 640, 810 P.2d 55, 817 P.2d 867 (1991). In addition, in order to pass constitutional muster, the imposition of legal financial obligations and any punishment for willful failure to pay must meet the following requirements:

1. Repayment must not be mandatory;

2. Repayment may be imposed only on convicted defendants;

3. Repayments may only be ordered if the defendant is or will be able to pay;

4. The financial resources of the defendant must be taken into account;

5. A repayment obligation may not be imposed if it appears there is no likelihood the defendant's indigency will end;

6. The convicted person must be permitted to petition the court for remission of the payment of costs or any unpaid portion; and

7. The convicted person cannot be held in contempt for failure to repay if the default was not attributable to an intentional refusal to obey the court order or a failure to make a good faith effort to make repayment.

State v. Curry, 118 Wn.2d 911, 915-16, 829 P.2d 166 (1992).

The imposition of costs under a scheme that does not meet with these requirements, or the imposition of a penalty for a failure to pay absent proof that the defendant had the ability to pay, violates the defendant's right to equal protection under Washington Constitution, Article 1, § 12, and United States Constitution, Fourteenth Amendment. *Fuller v. Oregon*, 417 U.S. 40, 40 L.Ed.2d 642, 94 S.Ct. 2116 (1974).

In the case at bar the trial court imposed discretionary legal financial obligations in the form of attorney's fees without any consideration of the defendant's ability to pay those obligations. Thus, the trial court violated RCW 10.01.160(3), as well as the defendant's right to equal protection under Washington Constitution, Article 1, § 12, and United States Constitution, Fourteenth Amendment. As a result, this court should reverse the imposition of legal-financial obligations and remand for consideration of the defendant's

ability to pay.

In this case the state may argue that this court should not address this issue because the defendant did not sufficiently preserve this statutory error at the trial level and the argument does not constitute a manifest error of constitutional magnitude as is defined under RAP 2.5(a). However, in *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015), the Washington Supreme Court took the opportunity to review the pervasive nature of trial courts' failures to consider each defendant's ability to pay in conjunction with the unfair penalties that indigent defendant's experience based upon this failure. The court then decided to deviate from this general rule precluding review. The court held:

> At sentencing, judges ordered *Blazina* and *Paige-Colter* to pay LFOs under RCW 10. 01.160(3). The records, however, do not show that the trial judges considered either defendant's ability to pay before imposing the LFOs. The defendants did not object at sentencing. Instead, they raised the issue for the first time on appeal. Although appellate courts will normally decline to hear unpreserved claims of error, we take this occasion to emphasize the trial court's obligation to consider the defendant's ability to pay.
>
> We hold that RCW 10.01.160(3) requires the record to reflect that the sentencing judge made an individualized inquiry into the defendant's current and future ability to pay before the court imposes LFOs. This inquiry also requires the court to consider important factors, such as incarceration and a defendant's other debts, including restitution, when determining a defendant's ability to pay. Because the records in this case do not show that the sentencing judges made this inquiry into either defendant's ability to pay, we remand the cases to the trial courts for new sentence hearings.

State v. Blazina, at 11-12.

In the case at bar the record reveals that the trial court did not make "an individualized inquiry in to the defendant's current and future ability to pay" before it imposed legal financial obligations. Rather, the court simply made a statement that the court "it's clear to me that if you do that, you're – there's no reason why you can't earn an income and make payments over – over this." RP 186. The court did not review any facts supporting its summary conclusion. Actually, the record reveals a number of facts that make it clear that the defendant does not have an ability to pay. These facts include that the defendant is an indigent drug addict with no driver's license who has a requirement of community custody, mandatory treatment once he is released from prison and non-discretionary legal-financial obligations. Thus, the record does not support the trial court's decision to impose discretionary legal-financial obligations. As a result, this court should reverse the imposition of all discretionary legal financial obligations.

IV. THIS COURT SHOULD NOT IMPOSE APPELLATE COSTS ON APPEAL.

The appellate courts of this state have discretion to refrain from awarding appellate costs even if the State substantially prevails on appeal. RCW 10.73.160(1); *State v. Nolan*, 141 Wn.2d 620, 626, 8 P.3d 300 (2000); *State v. Sinclair*, 192 Wn. App. 380, 382, 367 P.3d 612, 613 (2016). A

defendant's inability to pay appellate costs is an important consideration to take into account when deciding whether or not to impose costs on appeal. *State v. Sinclair, supra*. In the case at bar the trial court found the defendant indigent and entitled to the appointment of counsel at both the trial and appellate level. CP 3, 165-166. In the same matter this Court should exercise its discretion and disallow trial and appellate costs should the State substantially prevail.

Under RAP 14.2 the State may request that the court order the defendant to pay appellate costs if the state substantially prevails. This rule states that a "commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review." RAP 14.2. In *State v. Nolan, supra*, the Washington Supreme Court held that while this rule does not grant court clerks or commissioners the discretion to decline the imposition of appellate costs, it does grant this discretion to the appellate court itself. The Supreme Court noted:

> Once it is determined the State is the substantially prevailing party, RAP 14.2 affords the appellate court latitude in determining if costs should be allowed; use of the word "will" in the first sentence appears to remove any discretion from the operation of RAP 14.2 with respect to the commissioner or clerk, but that rule allows for the appellate court to direct otherwise in its decision.

State v. Nolan, 141 Wn. 2d at 626.

Likewise, in RCW 10.73.160 the Washington Legislature has also granted the appellate courts discretion to refrain from granting an award of appellate costs. Subsection one of this statute states: "[t]he court of appeals, supreme court, and superior courts ***may*** require an adult offender convicted of an offense to pay appellate costs." (emphasis added). In *State v. Sinclair*, *supra*, this Court recently affirmed that the statute provides the appellate court the authority to deny appellate costs in appropriate cases. *State v. Sinclair*, 192 Wn. App. at 388. A defendant should not be forced to seek a remission hearing in the trial court, as the availability of such a hearing "cannot displace the court's obligation to exercise discretion when properly requested to do so." *Supra.*

Moreover, the issue of costs should be decided at the appellate court level rather than remanding to the trial court to make an individualized finding regarding the defendant's ability to pay, as remand to the trial court not only "delegate[s] the issue of appellate costs away from the court that is assigned to exercise discretion, it would also potentially be expensive and time-consuming for courts and parties." *State v. Sinclair*, 192 Wn. App. at 388. Thus, "it is appropriate for [an appellate court] to consider the issue of appellate costs in a criminal case during the course of appellate review when the issue is raised in an appellate brief." *State v. Sinclair,* 192 Wn. App. at 390. In addition, under RAP 14.2, the Court may exercise its discretion in a

decision terminating review. *Id.*

An appellate court should deny an award of costs to the state in a criminal case if the defendant is indigent and lacks the ability to pay. *Sinclair, supra.* The imposition of costs against indigent defendants raises problems that are well documented, such as increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration. *State v. Sinclair*, 192 Wn.App. at 391 (citing *State v. Blazina*, *supra*). As the court notes in *Sinclair*, "[i]t is entirely appropriate for an appellate court to be mindful of these concerns." *State v. Sinclair*, 192 Wn.App. at 391.

In *Sinclair*, the trial court entered an order authorizing the defendant to appeal *in forma pauperis,* to have appointment of counsel, and the have the preparation of the necessary record, all at State expense upon its findings that the defendant was "unable by reason of poverty to pay for any of the expenses of appellate review" and that the defendant "cannot contribute anything toward the costs of appellate review." *State v. Sinclair*, 192 Wn. App. at 392. Given the defendant's advanced age and lengthy prison sentence, there was no realistic possibility he would be able to pay appellate costs. Accordingly, the Court ordered that appellate costs not be awarded.

Similarly in the case at bar, the defendant is indigent and lacks an ability to pay. In fact, the trial court originally found the defendant indigent

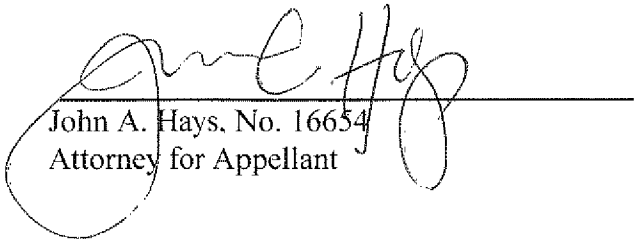
and appointed counsel at the trial level. The court then entered a new order after conviction authorizing the defendant to appeal *in forma pauperis*, finding that he lacked sufficient funds to prosecute an appeal. CP 119-120. These finding are supported by the record. The defendant is an unemployed drug addict who has failed at treatment in the past and who now has further non-discretionary legal financial obligation that he cannot meet. Thus, it is unrealistic to think the defendant will be able to pay appellate costs. As a result this court should exercise its discretion to reach a just and equitable result and direct that no appellate costs be allowed should the State substantially prevail on appeal.

CONCLUSION

This court should reverse the defendant's conviction for trafficking in stolen property and remand with instructions to dismiss that charge with prejudice. In addition, this court should reverse the defendant remaining convictions and remand for a new trial based upon ineffective assistance of counsel. Finally, this court should strike the trial counsel's imposition of discretionary legal-financial obligations and refrain from imposing costs on appeal should the state substantially prevail.

DATED this 8th day of September, 2016.

Respectfully submitted,



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APPENDIX

WASHINGTON CONSTITUTION
ARTICLE 1, § 3

No person shall be deprived of life, liberty, or property, without due process of law.

WASHINGTON CONSTITUTION
ARTICLE 1, § 9

No person shall be compelled in any criminal, case to give evidence against himself, or be twice put in jeopardy for the same offense.

UNITED STATES CONSTITUTION,
FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

UNITED STATES CONSTITUTION,
SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

. . .

RCW 9A.82.050
Trafficking in Stolen Property in the First Degree

(1) A person who knowingly initiates, organizes, plans, finances, directs, manages, or supervises the theft of property for sale to others, or who knowingly traffics in stolen property, is guilty of trafficking in stolen property in the first degree.

(2) Trafficking in stolen property in the first degree is a class B felony.

COURT OF APPEALS OF WASHINGTON, DIVISION II

STATE OF WASHINGTON, **Respondent,** **vs.** **BRANNON I. JONES,** **Appellant.**	**NO. 48689-0-II** **AFFIRMATION OF SERVICE**

The under signed states the following under penalty of perjury under the laws of Washington State. On the date below, I personally e-filed and/or placed in the United States Mail the Brief of Appellant with this Affirmation of Service Attached with postage paid to the indicated parties:

1. Ms Katherine Svoboda
   Grays Harbor County Prosecuting Attorney
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   Monteseno, WA 98563
   ksvoboda@co.grays-harbor.wa.us

2. Brannon I. Jones
   Washington Corrections Center
   P.O. Box 900
   Shelton, WA 98584

Dated this 8th day of September, 2016, at Longview, WA.

Diane C. Hays

HAYS LAW OFFICE

September 08, 2016 - 3:34 PM

Transmittal Letter

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Court of Appeals Case Number: 48689-0

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